AUG 29 1990
JOSEPH F. SPANIOL, J
CLERK

No. 90 - 81

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

W. DAVID WESTON
Petitioner

V.

JEFFREY G. BANKS, ET AL.
Respondent

On Writ of Certiorari to the United States Circuit Court of Appeals For the Tenth Circuit

PETITIONER'S REPLY TO RESPONDENT'S' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENTS' OPPOSITION TO JURISDICTION

The Respondents oppose jurisdiction claiming appellant's Petition for Rehearing in the lower court was not timely filed in conformity with Supreme Court Rule 13.4. Rule 40.3 of the Rules of Court for the United States Court of Appeals for the Tenth Circuit provides in pertinent part:

> "...petitions for rehearing... shall be filed within 14 days after the entry of judgment. The time for filing a petition for rehearing ...may be shortened by order of the court, but will not be extended except for good cause shown." (emphasis added)

The lower appellate court extended appellant's time for filing his Petition for Rehearing to March 23, 1990 "for good cause shown" pursuant to appellant's motion to accept filing and accompanying affidavit. The lower appellate court accepted appellant's petition as timely filed when they first considered and acted on appellant's Petition and by denying the Petition on April 25, 1990.

Appellant timely filed his brief for rehearing with the lower appellate court on March 16, 1990. Appellant was later informed by the Clerk of the Appeals Court that appellant's brief did not constitute a "petition" and appellant could file a petition for rehearing with a motion for leave to file the petition out of time. Petitioner's motion to have the petition filed out of time was granted. On April 5, 1990 Petitioner also filed a motion with the lower appellate court for leave to file a supplemental memorandum in support of appellant's petition for rehearing. On April 17, 1990 the lower appellate court granted the appellant's motion to file his supplemental memorandum and thereafter denied the petition on April 25, 1990.

Pursuant to Supreme Court Rule 13.4 the appellant's petition for rehearing was timely filed where the lower appellate court extended the appellant's time for filing pursuant to it's rule 40.3 for "good cause shown."

REPLY STATEMENT

The Respondents' opposition brief contains innuendo and character assassination to distract the Court from observing that the Respondents have avoided responding to the questions presented by the Petition. These questions identify irreconcilable inconsistencies between the legal conclusions of the District Court and the Appellate Court. These inconsistencies in law and fact strike at the very heart of this case - the issue of bad faith - based upon a legal interpretation of a contract. Such inconsistencies between courts within the judicial review process should not be allowed to stand nor should the injustice inherent in such inconsistencies be allowed to go unnoticed or uncorrected.

Rule 15.1 of the Supreme Court Rules states in relevant part:

> "A brief in opposition to a petition for a writ of certiorari... in addition to other arguments for denying the petition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted."

The Reply brief of the Respondents did not address the facts and issues of law set forth in Petitioners Petition as identified below as specified by Rule 15.1. Accordingly none of the arguments of the Respondents should stand as a basis for denying Petitioners Writ of Certiorari.

The Respondents did not address the first issue as to whether an appellate court can make a conclusion of law

diametrically opposed to the decisive conclusion of law made by the District Court upon which the case turns and not then find that the conclusion of law found by the District Court is clearly erroneous. The Respondents did not deny or refute the Petitioner's argument that the district court's conclusion of law that "The interests of the Associates in the sublease and claim were not assessable..." (D.C. Conc. of Law No. 7) was contrary to conclusion reached by the appellate court.

Nor did the Respondents deny that the appeals court found that the interests of the Associates were assessabile when it found "the Associates were required to pay additional development and production costs out of their share of the contemplated gold production." Cascade v Banks 896 F.2d 1557, 1568.

Petitioner similarly argued before the District Court and the Appeals Court that the Associates were required to pay additional production costs out of their share of the contemplated gold production i.e. Associates were responsible for the costs of production up to the value of the recoverable gold contained in the ore that was first mined, milled and removed for final gold extraction.

Respondents did not address the other issue raised to this Court as to whether the appeals court can make new findings of fact which are contrary to the findings of fact made by the District Court and which new findings are contrary to the record submitted to the Court.

The Respondents did not challenge the district courts acceptance of the reports of the geologists who testified that the Telegraph Mine project was economically viable with adequate financing. The Respondents did not deny that the district court also found from the expert's testimony that the mine property does contain extensive deposits of ore and that the property might have been operated at a profit from the gold and silver produced

during the participation of the defendant associates. (D.C. Trial Transcript March 27, 1985, p. 244 and Finding 116, p. 100.)

The Respondents did not deny the fact that the distric court's findings, based on the evidence, identified that production did not start until April 1982 following the completion of development work. The Respondents also did not deny or refute the fact that the record before the court established that by October 1982, 23,080 tons of ore had been mined, crushed, agglomerated and removed to a leach pile for gold extraction from which 504.67 ounces of gold had been removed worth $175,233.87. 4790.87 ounces of gold remained under continuous process of gold extraction which had a "contemplated" extraction value of $1,015,880 (gold at $344.98 pr/ounce). These facts are all contrary to the new findings of the appellate court.

Nor did the Respondents address or refute the fact that the appeals court made a contrary finding that no gold was produced at all (Cascade v Banks, supra, pgs. 1565, 1566, 1569, 1570) and in particular erroneously found that during the period of development gold should have been produced, but wasn't, when in fact no gold was intended or contemplated to be produced during this period of development by anyone. On the basis of this contrary finding the appeals court then made it's own new finding that since no gold was produced no additional assessments for production expenses could be made and accordingly any assessments made were made in bad faith.

The Respondents brush aside the questions presented to the Court by making untrue character assassinations which are not relevant to the questions presented. i.e. "Weston, a promoter in Salt Lake City, Utah, sold 35

sublease interests...";[1]" Weston.. .misappropriated $629,474.63..."[2] All the other allegations of the Respondents in their statement of the case turn on the questions before this Court. The Tenth Circuit Court's interpretation of the Associates contract that: "the Associates were required to pay additional development and production costs out of their share of the contemplated gold production"[3] is correct. Accordingly, there was no scheme to obtain additional money, Cascade was authorized to make assessments, no restitution of $70,449.68 is warranted, neither Cascade or Weston acted in bad faith and the objectives of the parties to the agreements were realistic and could be realized.

REPLY ARGUMENT

A. CONTRARY TO THE RESPONDENTS ASSERTIONS OF ACCORD THE LOWER COURTS TOOK OPPOSING ROUTES TO ARRIVE AT THEIR FINAL CONCLUSIONS AND THE ROUTES ARE NOT ONLY DISCORDANT BUT THE CONCLUSIONS DO NOT HARMONIZE.

1 Nowhere in the D.C. Findings is Weston identified as the promoter of the project. The D.C. Found that Defendants Harmatz and Hodowski originated the sublease concept (Finding 25) and sublease sales were principally made by Harmatz & Hodowski (Finding 41).

2 On remand the $629,474 was reduced to $464,474. Only $46,474.63 was at issue where the Gold Technics Defendants only owned 10% of the Telegraph Mine Joint Venture. At trial the Joint Venture argued that the Gold Technics Defendants had recieved either an offsetting loan or capital distribution of $40,949 and the parties owning 90% were entitled to offset the amount of $409,490. On remand the appellate court ordered that the Gold Technics Defendants account for and return these funds. Upon return of the Gold Technics amount the only amount unnaccounted would be $5,498.00 (10% of difference $464,474/$409,490) which the Joint Venture and Weston still dispute.

3 Cascade v Banks, 896 F.2d 1557, 1568

Justice is not served when the lower court's decisions are in conflict and do not harmonize either their conclusions of law or findings on the same or similar subjects. The resulting wrong is discordant and blatant and requires justicial resolution.

B. THE TRIAL COURT MADE CLEAR FINDINGS AS TO THE VALUE OF THE MINE AND THE APPELLATE COURT IGNORED THOSE FINDINGS, THE RECORD AND MADE NEW FINDINGS WHICH WERE UNSUPPORTED.

The Respondents' assert the District Court's findings of economic viability were misleadingly referenced by Petitioner though given some credence by Respondent's brief. Contrary to Respondent's assertion on page 9 that "the trial court made no findings (regarding mine value or project viability)," the trial court did make such findings particularly where it held against the Respondent/ Defendants in finding the $2,600,000 annual royalty (rental) to be paid by the sublessees for the mine property was not excessive. This finding denied the counterclaim of the Respondent/ Defendants who prayed the lower court would find the rental amount unconscionable. (See D.C. Findings No. 10 and 128).

Further, the district court in it's decision to bypass the remedy of forfeiture occasioned by the Respondent/Defendant's default reaffirmed it's opinion as to the value of the mine property by alternatively requiring the Telegraph Mine Joint Venture to purchase the defendant's sublease and 50% sublease interest for the set price of $2,411,200 and in additionally requiring the Respondent/ Defendants to forfeit $1,050,000 of the cash they had in-

vested.[4]

The main body of Respondent's arguments regard mere suppositions of the trial court such as "may have been destined to fail" or "might have been operated at a profit." These negative suppositions rest squarely on the question of adequate financing of production costs, which the appeals court found was provided for in the contract documents.

> "In our view, paragraphs 13(b) and 13(c), when read together, provided that the Associates were required to pay additional development and production costs..." Cascade v Banks 896 F.2d 1557, 1568.

As a result of the correct appellate court's contract interpretation the district court's suppositions become positive demonstrations that the contracts provided adequate financing as understood by all participants. Accordingly, the project was economically viable and would have produced a profit during the tenure of the Defendant Associates as found by the trial court (Finding 116) if they had just met their contractual obligations to pay their fair share of the production expenses.

Finally, the deposition of the attorney who assisted in drafting the joint operating agreement introducted at trial demonstrates that he confused the unique characteristics of the Telegraph associate's agreement with other similar agreements for which he was solely responsible and he erred in his non-assessability statement. Whether he erred or not is immaterial to the questions before this Court regarding the inconsistencies between the appellate court's

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4 As to the lease interest of Gold Technics the Court set the price at $100,000 plus $52,450.72 and 450,000 shares of Rex Montis stock. As to the sublease purchase $1,548,750 of royalty notes and $400,000 of development notes were forgiven plus $70,000 and 240,000 in cash was required to be paid.

contrary conclusions of law and findings and that of the trial court.

SUMMARY

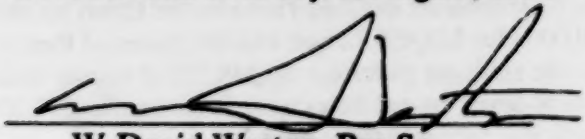
1. The Respondents have failed to address the questions of law and fact presented by the Petitioner. Accordingly the Petitioners fact and argument should be upheld as uncontested and the Petition for Writ of Certiorari should be granted.

2. The question of whether an appellate court can make conclusions of law which are contrary to and overturn the trial court's conclusions and then not find the trial court's conclusions clearly erroneous is of sufficient import in the interest of justice to warrant this Court's attention.

3. The question of whether an appellate court can make new findings of fact which are contrary to the district court's findings and the record in order to arbitrarily support it's opposing conclusions of law in order to arrive at a result similar to the trial court's is a sufficiently blatant miscarriage of the duties and responsibilities of an appellate court as to warrant this Court's scrutiny.

4. Questions regarding justicial miscarriage of duty and responsibility in the lower courts are proper issues to be reviewed by the Supreme Court. This Court has the proper duty to supervise, maintain standards and set in order the judicial system when the systems strays from its appointed duty as demonstrated by the Petitioner in the questions and issues presented to this Court.

DATED this 27th day of August, 1990



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